

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

COMPANY PETITION NO.408 OF 1997

Zenith Limited

....Petitioner

Vs.

Grand Foundry Limited

....Respondent

WITH

B.I.F.R. NO.196 OF 1998

Mr. Dinesh Kumar A. Dubey for petitioner.

Mr. Karl Tamboly a/w. Ms. Kausar Banatwala and Ms. Dipti Shah i/b.

Mr. Tushar Goradia for respondent.

CORAM : K.R.SHRIRAM, J.

DATE : 12th APRIL, 2018

P.C.:

1 This petition had been admitted by an order dated 10th July, 1998. The claim of petitioner was based upon an Inter Corporate Deposit dated 3rd November, 1995 for Rs.50,00,000/-. The company had made part payment of Rs.27,92,800/-. It is the case of petitioner that an amount of Rs.25,00,000/- towards principal alongwith interest at 36% was due and payable by the company and during the pendency of the petition, a further amount of Rs.1,00,000/- has been paid by the company. An appeal was filed challenging the order of admission and that appeal came to be dismissed by an order dated 3rd August, 1998.

2 The company filed a reference to Board for Industrial and Financial Reconstruction (BIFR), viz., Case No.196 of 1998. After BIFR took the reference on file, the company took out a company application no.475 of

1998 seeking stay of publication because the reference was registered in BIFR. By an order dated 6th August, 1998, the company application was allowed and consequently, publication was stayed. Therefore, the petition though admitted, has not been published.

3 The BIFR sanctioned a Rehabilitation Scheme for 7 years from 31st March, 2013 to 31st March, 2020 for implementation by all concerned under Section 18 of Sick Industrial companies Act (SICA). Once the Scheme is sanctioned, as provided in Section 18(8) of SICA, it shall be binding upon all the creditors. Under the Scheme, the claim of petitioner herein was settled at Rs.5,42,000/- approximately 22.6% of its claim. This amount was arrived at par with other unsecured corporate lenders. As provided in clause 7.3 (i) of the Scheme, copy whereof is annexed to an affidavit of one Kiran Jangla affirmed on 22nd March, 2018, this amount of Rs.5,42,000/- was to be paid within six months of sanction of Scheme. Six months would have expired on 6th March, 2016 since the date of sanction of the Scheme is 7th September, 2015. Admittedly, this amount has not been paid and in effect, there is a contravention by the company of this Scheme. Mr. Dubey, counsel for petitioner, therefore, is seeking winding up of the company.

4 At the outset, Mr. Tamboly, counsel for the company raises a preliminary objection on the jurisdiction of this Court to hear the matter any further. According to Mr. Tamboly, Section 252 of the Insolvency and Bankruptcy Code, 2016 (IBC) amended the Sick Industrial Companies

(Special Provisions) Repeal Act, 2003 (1 of 2004) and the Central Government in exercise of the powers conferred by sub-section (1) of Section 242 of the IBC has made an order to remove difficulties dated 24th May, 2017 whereby a proviso has been inserted stating that “*any Scheme sanctioned under sub-section (4) or any Scheme under implementation under sub-section (12) of Section 18 of the Sick Industrial Companies (Special Provisions) Act, 1985, shall be deemed to be an approved resolution plan under sub-section (1) of Section 31 of the IBC and same shall be dealt with, in accordance with the provisions of Part II of IBC*”. Mr. Tamboly, therefore, submits that this Court should transfer the matter to NCLT for further consideration as required under Section 33 of the IBC and in particular, sub-section (3) of Section 33 of IBC.

5 Mr. Dubey submitted that since the petition was admitted much before the IBC was even contemplated and the petition was stayed because of the reference filed by the company to BIFR, this Court should continue to exercise its jurisdiction and pass the final winding up order.

6 I have given careful thought to the IBC (removing of difficulties) Order of 2017 dated 24th May, 2017. It would be useful to reproduce the order for ease of reference which read as under :

“And, whereas, clause (b) of section 4 of the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 has been substituted by the English Schedule to the Code, which provides that any appeal

preferred to the Appellate Authority or any reference made or inquiry pending to or before the Board or any proceeding of whatever nature pending before the Appellate Authority or the Board under the Sick Industrial Companies (Special Provisions) Act, 1985 shall stand abated. Further, it was provided that a company in respect of which such appeal or reference or inquiry stands abated under this clause may make a reference to the National Company Law Tribunal under the Code within one hundred and eighty days from the date of commencement of the Code;

And, whereas, difficulties have arisen regarding review of monitoring of the schemes sanctioned under sub-section (4) or any scheme under implementation under sub-section (12) of section 18 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) in view of the repeal of the Sick Industrial Companies (Special Provisions) Act, 1985, substitution of clause (b) of section 4 of the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 and omission of sections 253 to 269 of the Companies Act, 2013;

Now, therefore, in exercise of the powers conferred by the sub-section (1) of the section 242 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Central Government hereby makes the following Order to remove the abovesaid difficulties, namely :

1. Short title and commencement – (1) This Order may be called the Insolvency and Bankruptcy Code (Removal of Difficulties) Order, 2017.

2. In the Insolvency and Bankruptcy Code, 2016, in the Eight Schedule, relating to amendment to the Sick Industrial Companies (Special Provisions) Repeal Act, 2013, in section 4, in clause (b), after the second proviso, the following provisions shall be inserted, namely -

Provided also that any scheme sanctioned under sub-section (4) or any scheme under implementation under sub-section (12) of section 18 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall be deemed to be an approved resolution plan under sub-section (1) of section 31 of the Insolvency and Bankruptcy Code, 2016 and the same shall be dealt with, in accordance with the provisions of Part II of the said Code.

Provided also that in case, the statutory period within which an appeal was allowed under the Sick Industrial Companies (Special Provisions) Act, 1985 against an order of the Board had not expired as on the date of notification of this Act, an appeal against any such deemed approved resolution plan may be preferred by any person before National Company Law Appellate Tribunal within ninety days from the date of publication of this order.”

7 Therefore, this order was passed because it came to light that when the reference, that were pending before BIFR or AAIFR stood abated,

various difficulties arose regarding review and monitoring Scheme sanctioned and under implementation under sub-section (12) of Section 18 of SICA. For removing the difficulties, the Central Government made the IBC (Removal of Difficulties) Order, 2017 dated 24th May, 2017 where it is expressly provided that *“any scheme sanctioned under sub-section (4) or any scheme under implementation under sub-section (12) of Section 18 of SICA shall be deemed to be an approved resolution plan under sub-section (1) of Section 31 of IBC and the same shall be dealt with, in accordance with the provisions of Part II of the said Code”*. NCLT is created as a specialised regime under the IBC to deal with such matters.

8 Therefore, the Scheme that has been sanctioned by BIFR which is under implementation shall be deemed to have been approved under Section 31(1) of IBC. Sub-section (3) of Section 33 of IBC provides that “where the resolution plan approved by the Adjudicating Authority (in view of the stay order, it should be read as BIFR) is contravened by the concerned corporate debtor (the company), any person other than the corporate debtor (the company and this would include petitioner herein), whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order as referred to in sub-section (1) (b) (i) (ii) (iii) of Section 33 of IBC.

9 Therefore, since the company has contravened the Scheme sanctioned by BIFR, petitioner has to make an application to the NCLT for

liquidation order of the company. Therefore, the records and proceedings in this matter be transferred to NCLT, Mumbai and petitioner will be at liberty to take out an appropriate application to NCLT for appropriate orders as required under the provisions of IBC. Sub-section (4) of Section 33 provides that *“on receipt of an application under sub-section (3), if the Adjudicating Authority comes to a conclusion that the company has contravened the provisions of the resolution plan or sanctioned Scheme and in view of the order, resolution plan will include the sanctioned Scheme to BIFR, the Adjudicating Authority shall pass a liquidation order as referred to in sub-clause (b) of sub-section (1) of Section 33”*. Sub-section (3) and sub-section (4) of Section 33 read as under :

“(3) Where the resolution plan approved by the Adjudicating Authority is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

(4) On receipt of an application under sub-section (3), if the Adjudicating Authority determines that the corporate debtor has contravened the provisions of the resolution plan, it shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

10 The Adjudicating Authority under sub-section (1) of Section 5 of IBC means National Company Law Tribunal (NCLT) constituted under Section 408 of the Companies Act, 2013.

11 Registry to transfer the papers to NCLT within four weeks from today.

12 In view of the above, the petition and BIFR Recommendation no.196 of 1998 accordingly stand disposed.

(K.R. SHRIRAM, J.)